EMPLOYMENT TRIBUNALS

Claimants: Mr Alpha Anne
Ms Memuna Kabia
Mr Philip Sraha
Ms Genevieve Tommy

Respondent: Great Ormond Street Hospital for Children NHS Foundation Trust

Heard at: London Central

On: *in person* 1, 2, 3, 6, 7, 8, 9 10 March 2023; *in Chambers* 13 March 2023, 30 November 2023 & 11 January 2024.

Before: Employment Judge Emery
Ms Z Darmas
Ms L Woodward

REPRESENTATION:

Claimant: Ms B Criddle KC (counsel)
Respondent: Ms C Darwin (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of indirect race discrimination fail and are dismissed**.**

REASONS

The Issues

1. There are currently 80 claimants within this multiple claim, (146). All claimants are of BAME background. All are Domestic Cleaning Operatives, often described in the documentation as cleaners, they have been employed directly by the respondent since 1 August 2021. Prior to this date they were employed by a series of contractors the last being OCS, undertaking the same role.

2. The claimants claim indirect race discrimination for what they say is a continuous failure to act commencing from 1 August 2016 to the date of claim. The alleged discrimination is

    a. The failure to require OCS to offer its employees Agenda for Change (AfC) rates – the hourly rate and other AfC terms, including contractual sick pay, annual leave and overtime, access to the NHS Pension scheme.

    b. on transfer into the respondent on 1 August 2021, offer AfC rates from day 1.

3. The issues are set out in detail in the conclusion section below.

Witnesses

4. We heard from the following witnesses for the claimants, the first four were chosen by the claimants as 'lead claimants', i.e. a representative sample of the 80 claimants.
    a. Mr A Anne
    b. Ms M Kabia
    c. Ms G Tommy
    d. Mr P Sraha
    e. Mr P Elia, General Secretary of United Voices of the World (UVW) Union.

5. We heard from the following witnesses for the respondent.
    a. Ms S Ottaway
    b. Ms S Chegra
    c. Ms D Wilson

4. The Tribunal spent much of the first day of the hearing reading the witness statements and the documents referred to in the statements. There was an agreed bundle of 2169 pages.

5. This judgment does not recite all the evidence we heard, instead we confined our findings to the evidence relevant to the issues in this case. The nature of this case means that there is significant relevant background evidence, set out below.

6. The judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

6. The longest-serving of the lead claimants, Ms Menuma Kabia, started working as a cleaner at Great Ormond Street hospital in 2002. It appears that the respondent was at this time running its cleaning services in-house. At some point in 2003, the respondent outsourced his cleaning services to ISS Cleaning Services Limited (ISS).

7. In December 2004 the Agenda for Change ('AfC') in the NHS was implemented. We accept that at some point shortly after, the majority of roles in the NHS, both clinical and non-clinical, were banded under what was described as "the new NHS Job Evaluation Scheme", which stated that by October 2004 "many jobs have been evaluated nationally" under Bands 1 – 9 (see 1375, 1382).

8. We accept that by late 2004, hospital domestic operative cleaner roles were classed at what was AfC Band 1. In 2018 Band 1 closed to new entrants. At around this time we accept that cleaner roles were reclassified to AfC Band 2.

9. In 2008, the cleaning services were contracted from ISS to MITIE Health and Hygiene Ltd (MITIE) and cleaners currently employed TUPE'd to MITIE.

10. On 1 August 2016 cleaning services were transferred from MITIE to OCS (446-726). The "Soft Services Contract" between the respondent and OCS (Supplemental T&C FINAL at page 415) states: the respondent "pays the LLW to all relevant supplier and sub-contractor staff". The contract specifies that OCS will pay LLW to all eligible cleaners. Clause 10.1 specifies the eligibility criteria for paying LLW (number of hours at respondent's site, etc). All claimants were eligible for LLW (see also 526-7). The contract specifies that the contract price will be increased annually to take account of the CPI and future increases in the LLW.

11. In 2018 – 2019 cleaners employed by OCS at the respondent including many of the claimants raised several grievances. These included issues of bullying at work, failure to pay the LLW, and on 20 December 2019 a grievance which raised an allegation that "those employed directly by OCS" were paid SSP and 28 days annual leave "whereas other colleagues were paid different pay rates (815-6). Apart from this possible but oblique reference to AfC terms, these grievances did not raise that there was a failure to pay AfC terms and conditions.

12. In February 2020 NHS England instructed Trusts to pay full sick pay to its contractors with Covid-19 related sickness absence (827-8).

13. Many OCS employees working at the respondent including the claimants raised a grievance, undated but likely January/February 2020, about a failure to adopt and adhere to AfC. This was sent to OCS and the respondent. It stated that OCS had "denied" AfC in relation to annual leave and pay. It referred to other NHS Trusts which had adopted AfC terms and conditions for contract cleaners (822-3).

14. In response on 3 March 2020 the respondent stated that these were issues to be "resolved" by the employer, OCS (825).

15. However, OCS then referred the AfC issue back to the respondent. In OCS's grievance outcome dated 25 August 2020, on the issue of AfC and pay harmonisation: "it will be a decision for [the respondent] (most likely at the next tender) if they wish to mirror all staff to AfC terms and conditions. Such issues are not for OCS to review." (835).

16. The claimants' case is that the terms of contract between OCS and the respondent allows the respondent to determine cleaners' rates of pay and benefits. In her evidence, Ms Ottaway accepted that there was nothing stopping the respondent requiring OCS to provide for AfC terms to be "mirrored" in OCS employee's contracts, "Yes, [the respondent] could have done so".

17. While not involved in the process in 2016, Ms Wilson's evidence was that the respondent could have required the invitation to bid from contractors to be based on NHS terms, this was discussed in 2020 during the decision process on whether to re-tender or go in house " … we could ask private sector to offer AfC terms". Ms Wilson confirmed that it was possible to ask contractors to offer AfC terms, and this could have been done in 2016.

18. The respondent's case as put to witnesses was that it was for OCS to choose to pay AFC if it wanted to, and it was not the responsibility of the respondent if OCS chose not to do so, that it was "not the case" that the respondent determined pay.

19. The respondent also raised the following argument: it would be unfair to cleaners if they received AfC when working at the respondent, because if OCS moved them to another site, as contractually they could, they may receive a lower hourly rate. We do not agree that this was a realistic argument, it suggests that it is unreasonable to give better terms because they may get lesser terms elsewhere. This may be the case, but we do not agree that paying a lesser rate was therefore 'fairer'.

20. The contract costings were negotiated to reflect any future increase in LLW (425). We conclude that paying LLW was a precondition of OCS winning the contract. We do not accept that OCS "set" the pay rate, as the respondent required payment of LLW.

21. We accept based on this evidence that that was nothing which could have stopped the respondent requiring OCS to offer contractors working at the respondent sites equivalent terms to AfC, even if OCS did not offer equivalent terms on other sites. We accept that it was possible to negotiate terms specific to a particular site, it is dependent on what the parties negotiated on the contract terms between OCS and the respondent.

22. In conclusion on the above evidence, we conclude that the respondent did set the rate of pay for OCS employees working at the respondent, and it was a condition of its contract that OCS paid the LLW. Ms Ottaway accepted the respondent could have required enhanced pay terms. There was no provision within the contract price for OCS to increase its wages beyond LLW even if it wished to do so, without it accruing significant losses on the contract. We do not accept the respondent's arguments that OCS was able to increase pay when constrained by contract price which had been negotiated based on LLW rates.

23. By September 2020, active consideration was being given by the respondent to the OCS contract. This was expiring end July 2021; OCS were not interested in retendering. Options were discussed at a Staff partnership Forum - putting out

to tender or bringing in house. It was noted by respondent participants that the cleaners had faced significant problems with their employer (837-9).

24. An Options on the OCS contract was discussed at an Executive Management Team Meeting on 4 November 2020. The Options paper discussed the significant difficulties experienced with OCS, "operational issues around the accuracy of data and reporting… health and safety issues …". Options were discussed. The recommended option was to pursue an in-house solution, subject to this being an "option" financially. "There is a strong desire for the trust to provide parity of pay and conditions … key areas of enhancement … [are] Pension, sickness benefit and holiday entitlement." To move to an in-house provision was costed to add 23% to the current cost. The cost of the NHS Pensions scheme would add 17.5%; 3% would be enhanced "full NHS sickness funding.."; 3% to additional holiday entitlement. Additional costs included central support staff including managers, HR, finance, procurement. The 2nd option was to tender, and the pros and cons set out.

25. The Executive Management agreed on 4 November 2020 that the ambition was to bring the service inhouse, that they first required more clarity on costs and a benchmarked analysis of value (844-5).

26. On 11 November 2020, Mr Elia of UVW wrote to the respondent and OCS making an "official claim" on behalf of domestic workers "to be brought in house and made direct employees" of the respondent (846-7).

27. A Trust Board meeting on 26 November 2020, discussed a "Proposal" to gain "in principle authorisation" to move to an in-house solution for cleaning and retender all other FM soft services contracts (896-903). In answer to questions, it was acknowledged that the reason why the service had been outsourced was "primarily due to the costs involved".

28. The Board minutes note that "a large number of contracted cleaning staff were subject to unfavourable terms and conditions of employment". The Board accepted that the respondent "had an obligation to support these staff…." The Board agreed to move forward the proposal "to move to an in-house cleaning provision and to re-tender all other FM soft services contacts." (907-8).

29. The respondent announced this decision on its website on 9 December 2020 (909).

30. On 14 December 2020 Mr Elias of UVW wrote to the respondent asking, amongst other issues, for parity of AfC terms and conditions pending transfer; and parity from the date of transfer. The response was that "all matters" relating to employee's terms will be addressed with the employee directly. (911-3).

31. UNISON and Unite are recognised unions – they were involved in the consultation process for OCS staff transferring to the respondent. This process started in January 2021. UVW was not a recognised union and was not involved in this process.

32. At a Staff Partnership Forum on 23 February 2021 there was a discussion about the complexity of this TUPE transfer, the different terms and conditions, difficulties gaining access to 'detailed" information prior to transfer. The respondent's position was that it "would not be possible to move all staff over" to AfC terms "due to the complexity"; also TUPE requirements that employee information would not be received until 30 days prior to transfer, which was "not enough time" to manage the transaction. (923).

33. At the Staff Partnership Forum on 21 March 2021 concerns were raised about the failure to agree to AfC on transfer – the respondent's position was that it was "constrained by the law … options to mitigate [would be] considered." (939).

34. By 30 April 2021 the respondent had undertaken a Job Evaluation Matching process for the Domestic Cleaning Operative role – i.e. the role undertaken by the claimants.

35. Ms Chegra's evidence was that she was provided with the OCS job description (1991) to assess the Domestic Cleaning Operatives role. Her evidence was that this job description was a "generic job description" for hospital cleaners.

36. Ms Chegra said the reason why the respondent needed to assess the job description in April 2021 was to ensure that by the date the service was brought in-house there was adequate bank cover, in particular to cover potential gaps in work allocation and rosters. The respondent was "not familiar" with how staff were rostered at OCS "So we needed to ensure we had people on bank to fill gaps. I could not recruit to bank without a JD. We needed a JD ready to go. I also need a JD to be able to go through the job evaluation process."

37. Ms Chegra stated that the OCS job description she was given was checked "we needed to ensure that this job description was validated for the role. We spoke to floor managers who work closely with the cleaners, and the facilities manager, so we ensured that this JD captured the duties". This process led to Ms Chegra drafting the respondent's job description for Domestic Cleaning Operative at 1951-6.

38. This job description was then used by JME Partner Limited to job match the Domestic Cleaning Operative role against the AfC Bands. The score achieved for this role on the Job Matching Form criteria was 184. The Band 2 range is 161 – 215.

39. Ms Chegra's evidence was that this process was completed on the date specified on the Job Matching Form – 30 April 2021 (1948).

40. The Tribunal concludes that the latest date at which the respondent knew its incoming OCS Domestic Cleaning Operatives would be entitled to AfC Band 2 rates and benefits was 30 April 2021.

41. We therefore wonder why questions were put to claimant's witnesses on the following lines: that the delay in harmonising terms to AfC after the transfer in house was because the respondent "had to evaluate" the claimants' roles as

"they did not employ cleaners". In particular, it was put to Mr Anne that the job evaluation "started" in April 2021 that the respondent had to "look at your work and try to match to the band … this was a complex process of assessing what your role involves and comparing with others….". This case put to Mr Anne was concerning because it was contrary to Ms Chegra's subsequent, accurate and clear evidence.

42. We also disagree with the respondent's contention that there was no AfC national evaluation for cleaners, hence the need for a local evaluation. The claimants' case is that the job evaluation at 2145 is the national evaluation for domestic staff including cleaners. The respondent disputes this, its case is "there is no national evaluation". This is why it was put on the respondent's behalf that the evaluation was a "complex task" that this required experts familiar with the AfC. But 2145 says that cleaners is a Band 2 role.

43. While we accept the respondent behaved sensibly and properly in obtaining a local job evaluation, we do not accept it was entitled to argue throughout this case that there was no national job evaluation for the respondent's position of Domestic Cleaning Operative or suggest that after April 2021 it remained unclear which band applied to the incoming claimants.

44. On 18 June 2021 the respondent issued its response to a Freedom of Information request from UVW for data about the ethnic origin of respondent employees in AfC bands 2 to 4 (969-75).

45. A Staff Partnership Forum Meeting on 29 June 2021 set out the respondent's proposed timetable in an attachment discussed at the meeting. This said that in the period immediately before and after transfer the following would happen: Payroll documentation would be updated; personnel files would be received; ensure all employees are managed, settled. In months 2 – 12 there would be a work through the "more complex issues" related to transfer including staff/people-related issues (983).

46. The initial measures letter from the respondent to OCS dated 28 April 2021 specified the following substantive changes to the claimants' terms and conditions: a change in sickness entitlements to AfC rates; transferring employees to be automatically transferred to NHS pension entitlements (944-9).

47. In an updated position on intended post-transfer measures dated 24 May 2021: sick pay was increased to AfC rates: dependent on length of service up to 6 months full pay and 6 months half pay.

48. In a further updated measures letter to OCS on 16 July 2021, it was made clear that AfC "entitlements, benefits and allowances" within the respondent's policies and procedures "will not be applicable" to transferring OCS employees unless otherwise explicitly agreed in the initial intended measures document (992).

49. The claimants' case is that they should have been offered AfC or equivalent pay rates and terms while employed at OCS. Mr Elia argued that this would involve

a job evaluation exercise for the role undertaken by OCS operatives, this would provide the AfC band. We noted that this had already taken place, in April 2021.

50. The respondent argued that there would be significant additional costs in moving contractor's employees to AfC terms, that it would be a "complex process".

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51. The respondent also contended that OCS had no way of comparing a cleaner role with AfC employees, that there was no agreed national profile for this role, it did not have the infrastructure to make this comparison. In fact, Ms Chegra was able to draw up a job description quite easily in April 2021, the Job Matching Form was completed shortly after, all while the claimants were employed by OCS. Mr Anne's evidence was that as cleaners they were all clear that they were in Band 2, that there was no reasons for the process to take as long as it did – "Band 2 is my level".

52. On 1 August 2021 the respondent took over the provision of cleaning as an in-house service. All of the claimants automatically transferred to the respondent on this date.

53. On 11 August 2021 the respondent's Executive Management Team Meeting agreed that there would be a "cash floor" rate for OCS employees equivalent to the minimum AfC band 2, including Inner London High-Cost Area Supplement, this would increase the minimum wage for transferring employees from the LLW of £10,85 to £11.84 ph. Employees were informed by letter dated 16 August 2021 (1016-9).

54. Ms Otaway's evidence was that one of the reason for not moving quickly to put employees on AfC terms straight away was the variability of contract terms amongst the transferring staff, and the provisions of TUPE, that changes were made over 18 months "in a carefully assessed manner". The priority she said was to ensure pay was correct, that the quality of data they received in the TUPE process from OCS was poor.

55. There were still areas of contractual entitlement where AfC terms had not been granted to the claimants. These were, according to Mr Elia of UVW in an email to the respondent on 2 September 2021, annual leave, maternity and paternity pay, child bereavement leave, overtime pay, redundancy pay, and injury pay (1026).

56. On 12 October 2021 a decision was taken by the respondent to provide AfC terms for (1) maternity, paternity, and adoption leave; (2) child bereavement leave (1035 – 6). On 14 October the claimants were told they would be provided with AfC annual leave entitlement backdated to 1 August 2021.

57. In a response to a UVW staff strike petition, the respondent informed employees that "we are absolutely committed to matching up the terms, conditions and working practices… however this is a complicated transition…" (1037).

58. In a Staff Partnership Forum update on 10 December 2021, the respondent stated that it had been agreed with the Unions that harmonisation of the cleaning

team onto AfC terms would be completed by end 2022, it would take this long because of the complexity of the process, there was agreement of the "key milestones" to be achieved (1049-50).

59. On 20 January 2022 transferred employees were informed they would receive two additional enhanced terms and conditions – alignment of annual leave based on length of service; and alignment of maternity, paternity and associated special leave policies (1051-2).

60. At a staff presentation in March 2022 the following was highlighted as the remaining AfC terms "we still need to work through". These were redundancy pay, injury allowance, NHS basic contractual hours; NHS pay structure, unsocial hours pay, minimum periods of notice (1066).

61. Harmonisation of unsocial hours was, the Tribunal accepts, a significant complicating factor. The Tribunal accepts that the limitation on AfC full-time employees of 37.5 hours meant that transferred employees regularly working longer hours may be disadvantaged. At a staff forum in November 2021 the impact of employees working up to 60 hours a week was discussed, in particular the TUPE provision that employees transferred on existing terms.

62. The respondent proposed to progress harmonisation in different phases in April, June, September, and December 2022 – which phase would depend on the complexity of the employee's working pattern. It was accepted that some staff may not take up AfC terms because of the issues involved – e.g. the 37.5 full-time hours rule.

63. Affected employees including the claimants were written to on 7 April 2022 to inform them of the issues still to be addressed (1077-9).

64. The AfC unsocial hours payments, offered to all employees in the different phases was as follows: Saturdays; weekdays after 8.00pm and before 6.00am and Saturdays: time plus 41%; Sundays and public holidays: time plus 83%.

65. Ms Menuma Kabia fell within Phase 1a – employees on a 35 hour per week contract who receive no unsocial hour's payments. The proposed transfer date to AfC terms was 1 April 2022 (1279).

66. Phase 1b employees (fewer than 35 hour a week and no unsocial hours) were written to on 25 April 2022.

67. Phase 2 employees including Mr Alpha Anne were written to in July 2022: Phase 2 - working 37.5 hours or less a week, who worked unsocial hours: the main change is the unsocial hours payments – to the rates specified above. The date of change was 1 August 2022 (1197-9). Mr Anne accepted AfC terms and conditions on 2 August 2022 (1200).

68. In Mr Anne's evidence, it was put to him that his hourly rate when employed by OCS was in fact above LLW – that in July 2019 (1135) his hourly rate was £12.12. Mr Anne's evidence is that he worked weekends, that he received the OCS

weekend rate. Mr Anne accepted that while working for OCS he received a rate above the LLW because the weekend rate for his role was higher than the weekday hourly rate.

69. On 22 December 2022 the respondent wrote to phase 3 employees - over 37.5 hours per week, no unsocial hours; and 'phase 4' employees over 37.5 hours per week, unsocial hours.

70. Ms Tommy was an affected employee: her contractual hours would decrease from 57 to 37.5 hours per week. While Ms Tommy could seek work on the bank, additional hours were not guaranteed. The unsocial hours payments would change, as above. Her letter contained a comparison between her current hourly and the change when she went onto AfC rates. Ms Tommy's day rate remained unchanged; her Monday to Friday after 8.00pm and Saturday rate increased by £3.04 per hour; her Sunday rate increased by £7.39 per hour. Her bank holiday rate decreased by £4.27 per hour. The changed rate was to be backdated to 1 December 2022 (1241). Ms Tommy accepted the AfC terms and conditions on 12 January 2023.

71. Mr Sraha received a similar letter – he worked 51 hours per week and AfC meant he was required to reduce his hours to 37.5 per week (1322-7). We accept his evidence that he transferred on the same hourly rate to the respondent from OCS - £12.83 an hour and had no higher weekend rate. After transferring his hourly rate went to £13.21 per hour. Mr Sraha's evidence was that he has not signed his AfC letter, he is awaiting a meeting with his manager. It was put to him that he would lose £8,300 in pay because of the reduction in his hours. Mr Sraha's evidence is that he would be able to work overtime or the bank, but he wanted to discuss the implications with his manager first.

72. The respondent's position is that the transfer to AfC terms and conditions was completed within a "reasonable time period" after August 2021, that it took a "measured and proportionate approach" to resolving the AfC issues. In questions to Mr Elia, its position is that it took time to work out who had what terms and conditions and how they would be affected by AfC. In addition, any changes had to be TUPE compliant; in addition staff had to be given a choice which added to the timescale – some would lose pay because hours worked would reduce.

73. Mr Elia's position was that the respondent may say its complex, but the respondent's witnesses have not explained why it was complex. He argued that phase one employees took 8 months, that there was no reduction in hours for these employees "so there is no explanation why the full range of AfC could not be implemented from day 1…". He said that staff with more complex issues could have been offered the choice on day 1.

74. The respondent disputes there was a disparate impact on the claimants. We considered the statistics in some detail.

75. The 2017 Workforce Race Equality Standard: this shows of the directly employed workforce

a. Band 2 - Clinical staff: 25 white and 36 BAME employees.
b. Band 2 non-clinical: 57 white and 74 BAME employees

76. The 2018 WRES (now describing staff as white or BME)

a. Band 2 - clinical staff: 30 white and 45 BME employees.
b. Band 2 – non-clinical: 53 white and 71 BME employees.

77. The 2019 WRES:

a. Band 2 – clinical staff: 33 white and 43 BME employees.
b. Band 2 non-clinical: 58 white and 69 BME employees.

78. The 2021 WRES: this does not differentiate between clinical and non-clinical staff. There is a Domestic Staff band for the first time. The respondents say this is the claimants who had been brought in-house during the year.

a. Domestic staff: 16% white and 78% BAME employees
b. Band 2: 41% white and 51% BAME employees. (2052)

79. The 2022 Diversity and Inclusion Annual Report:

a. Domestic staff: white 13.9% and 79.2% BAME employees
b. Band 2: 42.6% white and 51.9% BAME employees (2090).

80. The respondents say that these statistics show that Band 2 employees are not 'predominantly white" as pleaded. The claimants argue that this is a material difference in disparity.

Legislation

81. Equality Act 2010

a. s.19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

…

- race;

b. s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section … 19 or 19A there must be no material difference between the circumstances relating to each case.

c. s.39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

…

(b) as to the terms on which A offers B employment;

d. S.41 Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) …

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

…

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b). supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

e. S.123 Time limits

(1) Subject to section 140Bproceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

f. s.136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

Case law

82. We referred to the general principles set out below. We also considered the cases cited in our conclusions section. As mentioned in the conclusions section we also considered the EAT judgment, *The Royal Parks Ltd v Boohene & Ors*.

a. *'Owusu v London Fire and Civil Defence Authority 1995* IRLR 574 EAT*:* C alleged (i) a failure to promote following 7 applications; (ii) a repeated failure to allow C to act up. The EAT concluded: (i) constituted several one-off acts; (ii) A persistent failure to offer C the opportunity to act up amounted to a potential continuing act 'in the form of maintaining a practice which, when followed or applied, excluded [him] from regrading or opportunities to act up', and was in time.

b. *Hendricks v Metropolitan Police Comr 2002 EWCA CIV 1986:* The correct focus is whether the employer may be responsible for an ongoing situation or continuing state of affairs in which the members of the defined group were treated less favourably.

c. *Calder v James Finlay Corpn Ltd* (1982) [1989] IRLR 55: A scheme whereby women employees could not obtain a mortgage subsidy was a continuing act of discrimination during the whole of her employment.

d. *Barclays Bank plc v Kapur [1991] IRLR 136 HL*: a bank's policy when calculating pension entitlement was not to allow for prior service in Africa; a policy which did not apply to those of European origin. This was not a 'deliberate omission', or one-off act; this concept is intended to be protect employees in respect of 'one-off' issues occurring in employment, rather than in the terms of the employment itself or a continuing situation. The HL held that this was a continuing failure to provide equal access to pension provision, a 'continuing act' lasting throughout the period of employment.

e. *Chaudhary v Specialist Training Authority of the Medical Royal Colleges EAT/1410/00 2001:*

> "The continuing application of a discriminatory rule or policy to a complainant is to be distinguished from the continuing existence of a discriminatory rule or policy and its single or occasional application to a complainant. An employment policy may be continuously or constantly applied to an employee and operate to his or her detriment as in *Barclays Bank plc v Kapur ….* However, the fact that the complainant is an employee cannot be determinative of the issue of whether an employer's discriminatory policy gives rise to a complaint of discrimination. For a complaint to be well founded that policy must be applied to the complainant to his or her detriment'.'

f. *British Medical Association v Chaudhary [2003] EWCA Civ 645*: Cases which involve a one-off decision, in this case a rejection for registration to the BMJ which was rejected "… are distinguishable from the cases in which an employer continuously applies a requirement, or condition, in the form of a policy, rule, scheme or practice operated by him in respect of his employees throughout their employment".

83. Provision, criterion or practice- Applies or would apply equally

a. Rutherford v Secretary of State for Trade and Industry [2006] UKHL 19: The PCP being complained of must be one which R 'applies or would apply equally' to persons who do not have that protected characteristic:

> 'It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups.'

b. British Airways Plc v Starmer [2005] IRLR 862, EAT: It is not necessary that the PCP was actually applied to others, so long as consideration is given to what its affect would have been if it had been applied.

c. Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15: "The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified …"

d. Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558, at [25]: "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

e. The Essop “salient features”:

i. "The first salient feature is that [… there …] is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

ii. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

iii. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various […]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They

could be traditional employment practices, such as the division between “women's jobs” and “men's jobs” or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Homer v Chief Constable of West Yorkshire [2012] IRLR 601, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem.

iv. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

v. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the “particular disadvantage” might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

vi. A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point

> can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

84. Particular disadvantage

    a. McNeil v Revenue and Customs Commissioners [2019] EWCA Civ 1112, [2019]: 'particular' makes clear that it was persons with the relevant protected characteristic who were disadvantaged.

    b. Pendleton v Derbyshire County Council [2016] IRLR 580, EAT:

        " … the comparative exercise … had to be based upon groups that were – absent the particular protected characteristic – in circumstances that were the same or not materially different (s 23 EqA). That meant the comparison of both groups (those sharing the Claimant's protected characteristic as compared to those who did not share that characteristic but to whom the PCP would also be applied) …"

    c. Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27: It is not necessary, in order for there to be particular disadvantage to those sharing a protected characteristic, for every member of the group to suffer the disadvantage.

    d. Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012]: the change in the EqA 2010 'was intended to do away with the need for statistical comparison where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question'.

85. Choice of pool

    a. Allonby v Accrington and Rossendale College [2001] EWCA Civ 52: the choice of pool must be logically defensible. This does not necessarily mean, however, that only one pool is permissible in any given situation. The decision of a tribunal will not be set aside simply on the basis that the EAT or CA might have adopted a different approach to the proper comparator pool to that of the tribunal, so long as the approach of the tribunal was permissible.

b. Naeem v Secretary of State for Justice [2017] UKSC 27: The 'pool' of individuals upon whom the effect of the provision, criterion or practice is evaluated must be populated by persons whose circumstances are the same, or not materially different from the claimant.

> "… the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under s.14 of the Equality Act 2006, at para. 4.18, advises that:
>
> > ""In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively.""
>
> "In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – i.e. the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

c. British Airways v Grundy [2008] EWCA Civ 1020:

> "The correct principle … is that the pool must be one which suitably tests the particular discrimination complained of … [the Tribunal] will be concerned to make a comparison which illuminates such … questions as seem to them potentially critical … and to find a pool which best helps them to do this. … A pool so narrow that no comparison can be made at all is unlikely to serve this end; nor a pool so large that the comparison is no longer of like with like …".

d. Jones v University of Manchester [1993] IRLR 218: Once the pool has been identified, the tribunal should consider the following test to determine whether the proportion of [women] who could comply was considerably smaller than the proportion of [men]. The court said a tribunal should proceed as follows:
   i. identify all those men and women who, but for the disputed requirement (i.e. the age), would be in a position to qualify for the advertised job;
   ii. divide that population into those who can comply with the requirement and those who cannot comply;

iii. ascertain the number of men and the number of women in each of these two groups and the number of men and women in the pool as a whole;
iv. express the proportion of men in the pool who can comply with the requirement as a percentage of the total number of men in the pool. Do the same in relation to the women in the pool;
v. compare the percentage proportion of men who can comply with the requirement with the percentage proportion of women who can comply with it and decide whether that comparison reveals that a considerably smaller proportion of women than men in the pool can comply with the requirement.

e. Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729:

> "The [authorities] establish that the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a question of discretion or of fact-finding but of logic. In reaching their decision as to the appropriate pool in a particular case, there may, depending on the PCP, be a range of logical options open to the Tribunal. As stated by Cox J in Ministry of Defence v DeBique
>
> > ""In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them.""

f. Cheshire & Wirral Partnership NHS Trust v Abbott [2006] IRLR 546: A claimant is not entitled to identify an artificial comparator group – it will often be appropriate to define the pool widely rather than narrowly.

g. R (Unison) v Lord Chancellor [2017] UKSC 51: In the employment tribunal fees litigation, the PCP was considered as follows:

> "the PCP in question should be the higher fees for all Type B claims, not just for discrimination claims. Section 19(2)(a) provides that the PCP must apply to everyone, whether or not they share a particular protected characteristic, so in this case to everyone who brings a Type B claim. Section 19(2)(b) then requires that the PCP puts a sub-group of those people, who have a particular protected characteristic, at a particular disadvantage when compared with others who do not share that characteristic. It is at this point, rather than the earlier point, that a subgroup is carved out. Even if, for the sake of argument, we concentrate on the subgroup of women who bring discrimination claims, it is difficult to see how they are put at any greater disadvantage by the higher fees than are all the other Type B

> claimants. They are all in the same boat, the women who bring discrimination claims and the men who bring unfair dismissal claims."

86. Evidence of disadvantage

    a. Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15: Statistical evidence is no longer required to show a 'particular disadvantage when compared to other people who do not share the characteristic in question'.

    b. Games v University of Kent [2015] IRLR 202, EAT: there no requirement to adduce statistical evidence, but the requirement to show that those who share the protected characteristic in question are also placed at a disadvantage still remains.

87. Justification:

    a. Bilka-Kaufhaus GmbH v Weber von Hartz C-170/84, ECJ: A discriminatory condition can be justified

    > "where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end."

    b. CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia C-83/14, [2015] IRLR 746: the principle of proportionality involves consideration of the balance between the benefit of the aim sought by the employer and the impact on the adversely affected group:

    > "Assuming that no other measure as effective as the practice at issue can be identified, the referring court will also have to determine whether the disadvantages caused by the practice at issue are disproportionate to the aims pursued and whether that practice unduly prejudices the legitimate interests of [the people affected by it]"

Conclusions on the evidence at the law

Claims prior to 1 August 2021

Scope of s.41 EqA 2010

Were the claimants contract workers of the respondent within the scope of s.41(7)?

88. The respondent accepts the lead claimants were contract workers of the respondent within the scope of s.41(7) but does not admit that the other claimants are contract workers.

89. The Tribunal considers that the use of lead claimants was to ensure that these cases would be representative of the whole group of claimants. That's the purpose of having lead claimants. The alternative was to have a much larger group of lead claimants.

90. We note the Order dated 18 April 2022 - lead claimants will be proposed, and it was for the respondent to accept or suggest alternatives by 13 June 2022: the parties accept that the outcome of the lead cases "shall be determinative of the issues … in respect of all claimants" (127). We note that on 5 July 2022 the respondent accepted the claimants' proposed lead claimants, that the respondent agreed "subject to a final review of contractual terms .. .which may lead to a proposal … of one further lead claimant". We note that Order dated 14 July 2022, states that the 4 lead claimants "shall be" lead cases "for all consolidated claims". We note further that the issue of lead claimants was not raised in various draft list of issues in the lead up to the ;liability hearing (287 – 314).

91. By the time of the hearing, the respondent has changed its position – it no longer agrees that the other claimants are contract workers – this is not admitted. No reason appears to have been provided in correspondence for the respondent's change of approach The Tribunal wonders about whether this is a position the respondent can reasonably adopt, given its prior concession on the use of lead claimants. The claimants forcefully say that the respondent cannot change its position – Ms Darwin for the respondent insists the respondent can do so.

Was the Respondent a principal within the scope of s.41(5)?

92. The respondent accepts this in respect of the lead claimants only. We make the same points as above: if the respondent does not accept the lead claimants as representative, it should have done so by 5 July 2022.

If so, do the Claimant's claims fall within the scope of s.41(1)(a) of the Equality Act 2010 which prohibits discrimination by a principal against a contract worker as to the terms on which the principal allows the worker to do the work?

93. The claimants' argument on 'scope' is that the respondent – the principal – dictates the salary of the claimants – the claimants are not allowed to work at its premises unless they are paid LLW, whereas it requires its own employees to be paid AfC.

94. The respondent says, per Allonby v Accrington & Rossendale College, that 'terms' must mean contractual terms, and that a contract worker's complaint about contractual issues lie with OCS and not the respondent. We note the respondent's reference to the ET Djalo judgment.

95. The respondent also argues that it would be an error of law go behind the 2016 Contract wording (parole evidence rule).

96. We note in this case that it is the respondent who effectively set the rate of pay. It insisted on payment of LLW to OCS employees working at its site. This

became a contractual term - page 415, the respondent pays the LLW to its … sub-contractor staff.

97. The respondent's witnesses accepted that there was nothing in principle stopping the respondent from insisting on a higher wage rate or AfC terms and conditions in its contract with OCS. OCS would have sought a contractual rate increase to cover this, as it did when the respondent insisted on paying LLW to its contractor staff.

98. We do not accept the respondent's characterisation that this was the minimum rate for OCS and it could choose to pay a higher rate. The contract documents make it clear that the contract price between OCS and the respondent is predicated on payment of the LLW, that the contract price will increase in line with LLW. We do not accept the respondent's argument that because OCS paid less (and occasionally more) than LLW meant that the respondent did not specify the pay rate; in fact the respondent expressed concern that OCS was breaching the agreed LLW pay rate.

99. We accept that if the respondent had decided to seek to pay AfC rates it could have specified this in its contract terms, and it was for OCS and the respondent to agree the appropriate contract price.

100. In conclusion, we do not accept that OCS dictated the wage rate of the claimants – it was the respondent who did so. It was therefore the respondent who set the rate of pay – the term – on which it allowed the claimants to work at its premises.

101. We therefore conclude that the claims prior to 1 August 2021 are in scope.

Time limits

Are the Claimants' claims in relation to the period prior to 1 August 2021 out of time?

Have the Claimants shown that there was 'conduct extending over a period' within the meaning of s.123(3) EqA 2010 between August 2016 and 7 January 2022 (when the ET1 was presented)?

Or is the claim about a failure to do something and, if so, should this failure be treated as occurring when the person in question decided on it (s.123(3)(b) EqA 2010)?

102. We conclude that in the period pre-August 2021 it is clear that the consequences of a failure to pay AfC rates had an adverse consequence on the claimants which extended over the whole period.

103. Did this amount to conduct extending over this period? We accept that the claimants requested the respondent to look at the issue of pay rates – on 20 December 2019, albeit that this was an oblique reference to unfair pay rates; and on 14 December 2020, a specific request for parity of AfC terms pending transfer.

104. On the December 2019 request, the respondent refused to get involved – it referred the claimants back to OCS (925). This was, we concluded, a decision of the respondent not to act. On the December 2020 request, the response was different – that the respondent would address "all matters" with the employee

concerned. This was not a rejection. We concluded that this response demonstrated that the respondent had not made up its *mind on this issue.*

105. We conclude that Barclays v Kapur applies. The respondent applied a policy of requiring its contractors to pay the claimants' LLW. Its witnesses accepted that it could have required OCS to pay the claimants AfC rates and offer AfC terms. The respondent made a decision which had a direct effect on the claimant's terms of employment, this was a continuing situation. It is analogous to, say, an employer's continuing failure to pay equal wages for like work in an equal pay claim. This was a continuing act, the application of a policy, and the claims were made in time.

Claims after 1 August 2021

106. The parties accept that the claimants were the respondent's employees after 1 August 2021 (s.83 EqA).

Scope of claims

Are the Claimants' claims within s.39(2)(a) of the Equality Act 2010?

107. The Respondent disputes that the Claimants' claims are within s.39(2)(a) or s.39(2) at all. No reason was given for this.

108. In the absence of any argument, we accepted that the claims after 1 August 2021 clearly relate to the 'terms' of the claimant's employment - s.39(2)(a).

Interrelationship between s.19 and s.23 EqA 2010

109. The claimants contend that the Tribunal should consider the s.19 EqA 2010 issues first followed by the s.23 EqA 2010 issues. The respondent contends that the ET should first consider the s.23 EqA 2010 issues followed by the s.19 EqA 2010 issues.

110. We conclude that it would be normal practice to consider whether there was a PCP. We note *Dobson* above states the PCP should be considered first. Without a PCP, we considered it would be conceptually difficult to provide a meaningful comparison required under s.23. We were not told by the respondent that it would be an error of law to consider the PCP first.

Pre-1 August 2021 provisions, criteria or practices (section 19)

Do the PCPs relied on by the claimants fall within the scope of s.19 EqA 2010?

Did the respondent apply the alleged PCPs as set out below to the claimants?

111. The claimants allege the respondent applied the following PCPs:

    a. determining, directly or indirectly, whether individuals working at GOSH receive pay and other benefits in accordance with the terms of the

Agenda for Change ('AfC') dependent on their employment status, specifically (i) whether they are employed by the Trust and/or whether employment has transferred to the trust from an outsourced contractor employer under a relevant transfer…

b. making receipt of the band 1 or 2 AfC rate of pay and other benefits for working as a cleaner at GOSH dependent, directly or indirectly, on being directly employed by the Trust.

112. The respondent argues that the PCPs amount to two policies – one applying to the respondent's employees, one to OCS employees – which have been "artificially melded together" into one PCP applied to its employees and the claimants.

113. The respondent also relies on the ET case of Djalo. In Djalo the tribunal found that the respondent did not set the rate of pay of the claimants hence there is no PCP relating to pay applicable to the claimants. However, the facts in the present case are different, as we find that the respondent did set the rate of pay for the claimants, it specified that OCS must pay LLW to contractors working at its site.

114. The respondent also determines that its own employees receive AfC terms and conditions. We do not agree with the contention that because the NHS and not the respondent sets the AfC terms and payrate, the respondent does not operate a practice or policy on wages. It may not be its own policy, but it is its policy to pay AfC terms to its employees – this is what it does.

115. It *was* our *initial* view on our analysis that the claimants can show the PCP at (a) above was the practice of the respondent.

116. Following our deliberation and while finalising the judgment, the EAT's 2023 decision in *The Royal Parks Ltd v Boohene & Ors* was published. We met again on two occasions to consider the effect of *The Royal Parks* judgment on this case. We noted in particular the EATs analysis of the PCP adopted by the tribunal. The pleaded PCP was effectively that at (a) above – that Royal Parks made payment of LLW dependent on being employed by Royal Parks. The EAT accepted the respondent's argument that this PCP would require a comparison with all of Royal Parks contractors, not just cleaners (it also accepted that this would require significant disclosure).

117. In the present case, we have documentation which shows the pay rates of the claimants and how they were calculated, and the AfC Bands for the relevant period. We do not have any documents showing the pay and the ethnicity of other contractors working at the respondent's premises. The PCP at (a), following *Royal Parks,* requires such a comparison. We have no idea of how other contractors are paid; we do not know the ethnicity of such contractors.

118. It may well be that an analysis involving all contractors, or all at (say) Band 2, would show group disparate impact. But we do not have this information.

119. In the absence of this information we are unable to conclude that the respondent had a PCP by which it determined that AfC was dependent on being employed by it or TUPE transferred to it.

120. We noted *Royal Parks* consideration of the alternative PCP adopted by the tribunal during that hearing – which restricted the pool to the direct employees and outsourced workers in the cleaning contract. We considered this in light of the claimants PCP at (b) above. This PCP restricts itself to cleaners only – that to receive AfC as a cleaner you must be employed by the respondent. The comparison is therefore between cleaners employed in the trust and cleaners employed by contractors. The EAT in *Royal Parks* concludes that this is "an incomplete and indefensible comparison" (para 79) which left out of the picture all to the outsourced workers undertaking work for the respondent.

121. While we conclude that there was a significant degree of control by the respondent over the pay rate it paid to OCS employees, the claimants cannot show that the respondent applies the PCPs, because there is no evidence or analysis of how other contractors were treated.

122. It is for this reason alone that the claim fails.

123. If we are wrong on this point, we considered the other parts of the test. The respondent argues that above PCPs were not applied to both the cleaners and GOSH employees, and therefore there cannot be indirect discrimination within the meaning of s.19 of the 2010 Act (the *Onu* point). We conclude that the PCP at (b) above did amount to a policy. The respondent effectively set the rate of pay of the claimants in its contractual negotiations with OCS. A principal reason why the claimants were being brought in-house was to pay the claimants AfC rates. But, as the respondent's witnesses accepted, the respondent could have required OCS to pay AfC pay rates. When it was asked to do so, in 2019 and 2020, it refused to get involved.

124. If we are wrong in our Royal Parks analysis, we would have concluded from this evidence that receipt of AfC rates was dependent on cleaners being directly employed by the trust. We would have found that the respondent operated a practice that it would pay AfC rates of pay and other benefits to cleaners dependent on whether they were its employees.

Post 1 August 2021 provisions, criteria or practices (section 19)

Do the PCPs relied on by the claimants fall within the scope of s.19 EqA 2010?

Did the respondent apply the alleged PCPs as set out below to the claimants?

125. *Did R apply the following PCPs:*

    a. *determining, directly or indirectly, whether individuals working at GOSH receive pay and other benefits in accordance with the terms of the AfC collective agreement dependent on their employment status, specifically whether their employment has transferred to the Trust from an*

outsourced contractor employer under a relevant transfer in relation to their work at GOSH

b. making receipt of the band 1 or 2 AfC rate of pay and other benefits for working as a cleaner at GOSH dependent, directly or indirectly, on not having been transferred to the Trust from an outsourced contractor employer under a relevant transfer in respect of their work as a cleaner at GOSH

126. We reach the same conclusion as for the pre-August 2021 PCPs. Per *Royal Parks*, these cannot amount to a PCP.

Pools for comparison

If so, did or does the Respondent apply, or would it apply these PCPs:

a. in relation to pay, to those who carry out work for the Respondent which is or would appropriately be banded at AfC band 1 or 2;

b. in relation to benefits other than pay, to all staff working for the Respondent, whether directly employed or not, working in roles which have been evaluated by the AfC job evaluation scheme.

127. The respondent did not apply AfC pay or other benefits to the claimants. The respondent did apply AfC pay and benefits to its directly employed employees.

128. However we have no evidence as to whether or not the respondent applied the PCPs to other contractors undertaking work at AfC Bands 1 or 2. We consider following Royal Parks that the appropriate group must include all contractors. We do not know whether or not the respondent applied the PCPs to all those who undertake work for it at Bands 1 and 2. The claimants cannot therefore prove their claim.

Disadvantage

If so, do these PCPs put, or would they put the Claimants and others of a BAME background at a particular disadvantage "when compared with persons who are not BAME" because:

a. The Claimants contend that those of BAME origin are more likely than white colleagues not to be directly employed by the Respondent and/or to have transferred to the Respondent's employment from an outsourced employer under a relevant transfer; and

b. The Claimants are of BAME origin and contend that they were and continue to be engaged on worse terms as to rates of pay and other benefits than predominantly white colleagues directly employed by the Respondent since prior to 1 August 2021?

129. The claimants say that there is no material difference between the comparators in the PCP pool and the claimants, and the PCP is applied to the claimants and the comparators.

130. The respondent argues that the comparator group should include the "large pool of individuals" who work for GOSH as contractors who are not cleaners. It argues that a PCP which states only directly employed staff can get the AfC terms, quoting *Djalo*, "that would potentially discriminate against the whole innominate class of those whose work is carried out on the Respondent's premises via a contractor (or possibly an even wider pool…). The respondent also argues that the circumstances are different – by the fact that the claimants are employed by OCS under their terms and conditions; their comparators were employed by the respondent on AfC terms.

131. We do not have the evidence to show whether or not those of BAME origin are more likely to be contractors, that white colleagues are more likely to be directly employed. For this, we require evidence of the ethnic origin and pay status of all the respondent's contractors – at least those at AfC band 2 or equivalent.

132. We are clear that the claimants are disadvantaged in comparison to the respondent's directly employed workforce at Band 2 level, based on the statistics above. However, we have no evidence to say that other contractors are similarly disadvantaged. We do not know the racial origins of other contractor workforces. We cannot make a proper analysis without this evidence.

133. We therefore accept the respondent's critique of the comparator group pool. Following from the fact the PCP must be one applying to all contractors who are in the same or similar situation, the comparator group should include all contractors undertaking a role which has been nationally or locally evaluated within AfC Band 2 (or the old Band 1): this would include employees who were disadvantaged and advantaged by the PCP (Essop v Home Office).

134. We conclude that the failure to gain evidence in relation to other contractors - their pay rate, the statistics of BAME staff - means it is not possible to properly evaluate comparative disadvantage. For this reason, the claimants cannot show that they suffer a particular disadvantage.

135. We also reject the claimant's arguments that an *Enderby* analysis is appropriate. We accept that the Tribunal can utilise an Enderby analysis in an indirect race discrimination claim. We accept that the statistics we have seen show that there is a significant disparity between cleaners and Band 2 employees at the trust – this can be shown by the "Domestic" v Band 2 ratings in 2021. But, we accept based on the Royal Parks analysis, that we require evidence for all contracted employees. Without this evidence, the Tribunal cannot be satisfied that contracted employees are more likely to be BAME origin, and not paid AfC rates.

136. We do not accept the respondent's argument that there are material differences between the claimants' circumstances and those of its employees. We accept above that the respondent set the pay rate for OCS cleaners, and its evidence was that it could have agreed AfC rates with OCS if it had chosen to do so. We

strongly suspect that other contractors who were supplying staff to undertake jobs equivalent to AfC Band 1 or 2 roles were also required to pay LLW rates, the same as OCS, that the respondent effectively controlled the pay of such contract staff via the contract pricing and pay-rate negotiations which took place as part of the contract pricing process. But we have no evidence that this is the case.

Objective justification

Can the Respondent show that it adopted a proportionate means of achieving a legitimate aim? The legitimate aims relied on are:

Regulation 4(4) of the TUPE Regulations 2006 which renders any changes to terms and conditions as a result of a TUPE transfer null and void.

137. Pre-transfer, TUPE did not apply. This cannot be a legitimate aim for the failure to give AfC terms to OCS employees.

138. On or after transfer: We do not agree that the respondent can rely on TUPE Regulation 4(4) as the most proportionate means of achieving its aim. The respondent made some changes on transfer. The majority of employees had sought via a collective grievance a change to AfC rates. This is something that the claimants made been agitating for, via grievances to OCS and the respondent, and had been seeking via UVW day-1 AfC rights.

139. We conclude that this history are the factors which an employer is entitled to take into account when considering whether the 'ETO' provisions of Regulation 4(5) may apply. We do not agree that reliance on Regulation 4(4) was a legitimate aim or a proportionate means of achieving its legitimate aim when there was a clear argument that there was an Organisational (ETO) reason for making changes to the claimants' terms, with their agreement.

The NHS (as a whole) cannot determine pay and benefits for every contractor it uses, and imposing AfC on the private sector would have significant economic ramifications.

140. As a matter of fact, the respondent did determine the pay of the claimants, it required OCS to pay LLW. Its witnesses accepted that it could determine the pay and benefits of OCS. We do not agree on these facts that the respondent, as an element of the NHS, could not pay its contractors AFC terms.

141. One of the justifications for bringing the service back in house was on the basis that it was contracted staff were subject to "unfavourable" terms and conditions and that the respondent (not the NHS as a whole) had an "obligation: to support staff (26 November 2020 proposal to gain in-principle authorisation to move inhouse). While the reason why the service had been outsourced in the first place was on grounds of cost, no consideration was given as to why AfC equivalent terms could not be made a requirement of the contract terms with OCS at any stage. We did not accept this as a legitimate aim.

AfC is based on a national framework and requires a complicated equal pay assessment and assimilation process. There is no infrastructure for this to be

replicated in the private sector or any proper basis on which to compare roles in the same way between NHS employers and private sector employers.

142. The respondent was quite easily able to determine the role was AfC Grade 2 in April 2021. There was no evidence from the respondent as to why this exercise could not have been undertaken earlier. Contrary to the respondent's assertions, cleaners had been graded under AfC.

143. If the respondent had undertaken this exercise, it could have required OCS to ensure AfC conditions was offered to its employees, with the appropriate contract adjustment. The only reason why not, we conclude, was because the respondent did not want to engage with the issue, hence it passed the claimant's pay and conditions grievances back to OCS. This was not a legitimate aim and/or the means adopted to achieve it were not proportionate as no consideration was given to adopting AfC for the claimants, when the respondent's witnesses said it was possible to do so.

There are overarching requirements and policies within the NHS and public sector in respect of outsourcing and securing value for money. It is appropriate for the Respondent to comply with these overarching requirements. The policy of ensuring value for money is so that the Respondent can ensure that it delivers on its statutory objectives of delivering safe and effective healthcare within the context of constrained public funding.

144. We noted the Standard Financial Instructions, and paragraphs 17, 24 and 34 of Ms Wilson's statement. We noted the requirement to ensure best value for money in relation to tendered services. We concluded that this in-itself is a legitimate aim.

145. However, there was no real explanation from the respondent why a decision to offer AfC terms could not have occurred earlier, as the respondent's witnesses said was possible. When the claimants submitted a grievance, they were told by the respondent that their pay and terms were not the respondent's responsibility. The evidence we heard suggests that this statement was not accurate: in fact the respondent chose not to involve itself in discussions about the claimants pay and conditions, when it could have involved itself.

146. We also noted the "recommendations" section of the Soft Services Tender options paper, accepted by the Trust Board on 26 November 2020. This stated that while there would be a costs increase, the experience of other Trusts was that thee as an overall benefit "the cost impact to other Trusts has been accepted as the benefits outlined above improved the overall experience to the Trust". This strongly suggests that the evidence is that the respondent would have been better able to deliver on its statutory objectives if it had engaged with the claimants when the sought AfC tor comparable terms when employed by OCS.

147. We therefore do not accept that the respondent acted in a proportionate way to meet this legitimate aim.

Employees of contractors such as OCS may be deployed on a number of different contracts, not just NHS contracts, so any terms enforced on contractors by the NHS would lead to disparity, inequality and unfairness in respect of pay and benefits between employees deployed to work for an NHS organisation as compared to those deployed to other organisations.

148. This legitimate aim suggests that OCS should ensure all of its employees are on the same contract terms and the same hourly rates no matter the contract they are working on, this will mean its staff are not treated unfairly. We heard no evidence to this effect. We note that the respondent negotiated that OCS pay LLW. We doubt that OCS pays LLW to all its employees – if it is paid this rate will have been negotiated in the contract. We also do not accept that it is a legitimate aim to suggest that contracts rates cannot be raised unless there is a uninform increase across that contractors workforce, this is a justification for ensuring that terms cannot be increased, unless other employees who contract with OCS raise their rates first. Also, there is no suggestion that the respondent sought to benchmark the salary rate for its OCS contractor cleaners to the rest of OCS's cleaner workforce when it was negotiating LLW.

The Respondent is an accredited London Living Wage employer which means that it has made a commitment to ensure that all staff, including staff supplied via contractors and sub-contractors are paid a minimum of the hourly rate for the London Living Wage. That is on the basis that it believes that the London Living Wage has well documented benefits including improved productivity and retention together with lower staff training costs. The Respondent considers this commitment to be part of responsible business management. The Respondent should not be penalised for seeking a fair wage for contract workers and be put in a worse position than an employer who does not seek to impose such a requirement.

149. We did not accept that paying LLW could amount to a legitimate aim. If it is, it is saying that all the respondent needs to do as a responsible organisation is to pay the LLW; it is a circular argument that paying the LLW is a proportionate means of meeting its legitimate aim of paying the LLW.

150. We did not accept the premise of the rest of this argument – in particular the respondent accepts that it could have paid AfC rates, and that it mandated to offer AfC terms after the claimants were brought in-house. This puts itself in a worse position than employers who do not pay AfC or its equivalent to its employees or its contractors, but the NHS has chosen to require AfC for its employees. The argument remains – given the respondent's witnesses said it could be done, and given the respondent's agreement that AfC was required for its in-house employees, why could AfC not been offered to the claimants at an earlier stage? Even if this is a legitimate aim, this failure was not a proportionate way of addressing it.

The Respondent is seeking to harmonise terms and conditions in a way that is compliant with the principles of TUPE, does not disadvantage employees and has been agreed with the Unions. That agreement from recognised trade unions reflects that the Trust is taking a measured and proportionate approach to alleviating any disadvantage to transferring employees.

151. We did not accept this legitimate aim as factually accurate, in particular the TUPE issue (addressed above) – no consideration was given to the potential applicability of Reg 4(5).

152. We consider that the way in which the respondent sought to harmonise terms did disadvantage many employees. While agreement may have been reached with Unions, a significant part of the transferring employees did not agree with the process adopted and sought AfC terms from day 1. While a timeline was adopted for AfC changes, this was ongoing at the date of this hearing. We do not know why a speedier timetable could not have been adopted.

153. It is true that some employees may choose not to accept AfC terms. But a decision had been made to offer transferring employees AfC terms, and we saw no good reason why the respondent could not have offered 'day 1' rights to AfC terms, subject to the agreement of the employee in consultation meetings. We accept that some AfC terms were offered on day 1, and others were backdated. But many important terms were not, including the rate of pay.

154. Given the numbers of transferring employees, these meetings could have been undertaken on an agreed and reasonable timetable. Given the respondent's own witness evidence, we saw no logistical reason why such an approach could not be adopted.

155. This is effectively what had been sought prior to the transfer by the claimants via UVW, Mr Elia's approach was rebuffed and the issues raised were not addressed individually with employees, as the response to Mr Elia suggested. It was not proportionate to ignore an important issue raised by a significant proportion of the transferring workforce, whether raised via the UVW or otherwise.

156. The parties have, we know, anxiously been awaiting this judgment, and we apologise for its late delivery. This was in part caused by the difficulty in arranging dates to meet to discuss the implications of *The Royal Parks* judgment on the issues in this claim.

Employment Judge Emery
31 January 2024

Judgment sent to the parties on:

…15 February 2024……

For the Tribunal:

……

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